(4)

No. 91-1358

Supreme Court, U.S.
FILED
MAR 24 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

JOSEPH SCHWARTZ,

Petitioner,

v.

CITY OF FLINT,

Respondent.

Petition For Writ Of Certiorari To The Michigan Court Of Appeals

RESPONDENT'S REPLY BRIEF

LOYST FLETCHER, JR. (P-29799)
By: *BARRY A. WOLF (P-40709)
Attorneys for Respondent
718 Beach Street
Flint, MI 48502
(313) 238-4410

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

Petitioner's Reply Brief requires clarification regarding the claims asserted in the lawsuit upon which Writ Of Certiorari is sought herein.

In section number 2 of his Reply Brief, Petitioner states:

> 2. Respondent's second contention is that "Petitioner never sought to recover compensation through an inverse condemnation action" (Br, p. 6), although such a remedy is available under Michigan law. This lawsuit was filed precisely for such purpose. (Br, p. 2).

Contrary to Petitioner's assertion his lawsuit was not filed as an inverse condemnation action. In his complaint Petitioner alleged:

> 13. The unconstitutional assertion by Defendant City of its zoning authority constituted a "constructive taking" or "de facto taking" of Plaintiff's property within the meaning of the Uniform Condemnation Procedures Act, MCLA 213.41, MSA 8.265, and effected inverse condemnation of Plaintiff's property, depriving him of all reasonable and viable use of his land and his reasonable, investment-backed profit expectations. This constituted a taking of the property without payment of just compensation, in violation of Article X, Section 2 of the Michigan Constitution of 1963 and the Fifth Amendment to the United States Constitution.
>
> 14. The acts and omissions of Defendant City further deprived Plaintiff of his property without due process of law, in violation of Article I, Section 17 of the Michigan Constitution of 1963 and the Fourteenth Amendment to the United States Constitution. Plaintiff is entitled

> to redress from this Court pursuant to the Constitutional provisions cited in this and the preceding paragraph and 42 U.S.C. § 1983.

Petitioner's allegation is that an inverse condemnation occurred and that he was entitled to relief pursuant to the cited Constitutional provisions and 42 U.S.C. § 1983. He did not allege that he was seeking compensation for a taking of his property through an inverse condemnation action. And, in fact, Petitioner has never sought compensation through an inverse condemnation action.

In his Reply Brief Petitioner relied upon the cases of *Miller v. Campbell County*, 945 F.2d 348 (10th Cir. 1991), and *Samaad v. City of Dallas*, 940 F.2d 925 (5th Cir. 1992). Such reliance however is misplaced, as in both cases the Courts followed the dictates of *Williamson Planning Commission v. Hamilton Bank*, 473 U.S. 172.

In *Miller, supra*, the Court held that "[i]n those states that allow aggrieved property owners to bring an inverse condemnation action in order to recover compensation for property taken by the state, a Fifth Amendment taking claim is not ripe until the aggrieved property owner 'has used the procedure and been denied just compensation.' " *Miller v. Campbell County*, 945 F.2d at 352, quoting *Williamson Planning Commission v. Hamilton Bank*, 473 U.S. at 195, 105 S.Ct. at 3121.

In the case at bar Petitioner failed to seek compensation through an inverse condemnation action. Petitioner now claims that because he is barred from bringing an inverse condemnation action due to res judicata that the state compensation remedy is inadequate.

Because Petitioner has yet to bring an inverse condemnation action he cannot say with certainty that same would be barred by res judicata. If it is assumed that such an action brought at this late date would be barred by res judicata that still does not address the issue of whether the state compensation remedy was adequate.

Petitioner's failure to utilize an accepted and adequate state procedure to ensure just compensation should not now be rewarded by permitting Petitioner to proceed on his 42 U.S.C. § 1983 claim. To do so would encourage litigants to deliberately refrain from pursuing their state remedies in order to bring a federal claim under 42 U.S.C. § 1983.

RELIEF

Respondent again prays that this Honorable Court deny Writ.

Respectfully submitted,

LOYST FLETCHER, JR.
By: *BARRY A. WOLF (P-40709)
Attorneys for Respondent
718 Beach Street
Flint, Michigan 48502
(313) 238-4410

DATED: March 24, 1992

*Counsel of Record